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Brief of Gunby for Appts.

IN THE

Supreme Court of the United States.

Filed Feb. 7, 1900.

October Term, 1899.

No. 298.

ROTHSCHILD & BROTHER,
Appellants,
vs.
THE UNITED STATES,
Appellee.

Certificate of Appeal to the Supreme Court of the United States from the U. S. Circuit Court of Appeals for the Second District.

BRIEF OF APPELLANTS.

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STATEMENT OF CASE.

On the 18th day of September, 1897, Rothschild & Brother imported from Porto Plato, Santa Domingo, forty-five (45) bales of unstemmed leaf tobacco and entered same at the Custom House in New York as "filler" tobacco.

On the 5th of November the entry was liquidated on the return of the Appraiser and four (4) bales of tobacco, towit: Nos. 68, 71, 83 and 86, were returned as containing *wrapper tobacco*, as follows:

No. 68—1-$\frac{123}{577}$ per cent.
No. 71—3-$\frac{488}{606}$ per cent.
No. 83—2-$\frac{32}{534}$ per cent.
No. 86—2-$\frac{138}{531}$ per cent.

Duty was assessed on these bales of tobacco on the percentage of wrapper contained in the bales so returned by the Appraiser, at $1.85 per pound, and the remainder of the tobacco in each of said bales was returned as "*filler*" tobacco and duty assessed on same at 35 cents per pound, under Sections 213 and 214 of the Act of Congress, approved July 24, 1897.

A protest against this classification of duty at $1.85 per pound on any quantity of tobacco in these bales, as wrapper, was duly filled, as none of the bales contained more than fifteen (15) per cent. of "wrapper" and each bale was contended to be "filler" and was legally dutiable at 35 cents per pound.

On the 17th day of November, 1897, this protest was heard by the Board of U. S. General Appraisers, witnesses being examined both by the protestant and the Government, and on the 29th day of November, 1897, an opinion was rendered by the said Board sustaining the protest and for the first time construing Sections 213 and 214 of the Act of Congress of July 24, 1897, General Appraiser Tichenor filing a dissenting opinion.

An appeal was taken from this decision to the Circuit Court of the United States for the Southern District of New York, and on the 27th day of May, 1898, the decision of the U. S. General Appraisers was reviewed and a decision rendered by the Hon. E. Henry Lacombe, reversing the ruling and decision of the said Appraisers, and on June 16, 1898, an appeal was duly allowed from said decision to the U. S. Circuit Court of Appeals for the Second District:

The decision of the Circuit Court is as follows:

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

United States
vs.
Rothschild & Bros. } 2684

Appeal from a decision of the Board of General Appraisers, reversing a decision of the Collector of the Port of New York touching the duty on certain wrapper tobacco found packed in bales of filler tobacco, but not exceeding 5 per cent. of each bale.

Lacombe, C. J.:

Amid the awkward, tortuous and obscure phraseology of Paragraph 246 of the Act of 1883, one thing was manifest, namely, that in determining whether any particular leaf tobacco should pay a lower or a higher rate, it would be necessary to calculate a specified percentage of something. It became absolutely necessary, in order to apply the rule prescribed in the paragraph, to determine upon what base or on what unit such percentage should be calculated. In Falk *vs.* Robinson, 137 U. S., 225, the Court had to deal with an abnormal, if not a bogus, bale, and it is not surprising that the language used in the opinion was not practically of much use when normal commercial bales came under consideration. The necessity of finding a base number or unit available for such cases could not be overlooked *in re* Blumlein 5 C. C. A., 93; such a unit was declared to be the bale, and it is understood that the conclusion upon that point reached in that case has not since been questioned.

Erhardt v. Shroeder, 155 U. S., 124;
U. S. v. Rosenwald, 14 C. C. A.

The McKinley tariff of 1890, however, concededly abandoned the practice of taxing according to percentages. Under that act it was wholly unnnecessary to fix upon any base number or unit at all. Quite possibly the percentage method was restored by the Wilson tariff of 1894, indirectly by the use of the words "commercially known;" but there seems much force in the suggestion that when those words were dropped out of the Dingley tariff of 1897, the

percentage system dropped with them. Of course if the percentage system were abandoned, the necessity of determining a unit or base number ceased also and the decisions in the cases cited would be no longer instructive. Construing the phraseology of the Act of 1897, without reference to the earlier statutes and decisions, the correct paraphrase of the paragraphs 213 and 214, so far as they relate to unstemmed leaf tobacco, may be stated thus:

A duty of 35 cents per pound shall be paid on (A) all leaf tobacco not suitable for cigar wrappers and not otherwise provided for.

A duty of one dollar and eighty-five cents per pound shall be paid on

(A) All leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco which other tobacco is the product of any other country or dependency.

(B) All leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than fifteen per cent. of tobacco which is suitable for cigar wrappers.

(C) All leaf tobacco suitable for cigar wrappers.

The language used in the act seems to indicate that the draughtsman has tried to cut loose from earlier legislation and the decisions predicated thereon, and the case seems to be one where the language of the later act may fairly be construed without much regard to the construction put upon earlier and much more intricate phraseology.

I am strongly of the opinion that except for the purpose of imposing a penalty on any one importing an abnormal bale, (i. e., as the evidence shows one with more than 15 per cent. wrapper to less than 85 per cent. filler) any percentage system is abandoned in this tariff, and that all wrapper tobacco, wherever found and in whatever amount, shall pay the higher rate.

Inasmuch as the case will undoubtedly be appealed, it seems unnecessary to discuss the question presented at any greater length.

Decision reversed and Collector sustained.

This cause came on duly to be heard in the Circuit Court of Appeals, and on the———day of———, 1899, was certified by the Judges of the Circuit Court of Appeals to this Court for its opinion upon the construction of the statutes under which the classification of this tobacco was made.

ARGUMENT.

The errors assigned in this case raise only one question for the decision of this Court, viz: What is the proper construction of Sections 213 and 214 of the tariff act of 1897?

The Government contends that a proper administration of this act demands the collection of the higher rate of duty on all leaf tobacco suitable for wrappers for cigars contained in any bale, box or package, where the quantity contained in said bale is 15 per cent., or less, at $1.85 per pound, permitting the importer to pay the lower rate of duty of 35 cents per pound on all *filler* tobacco contained in said bales; but should a bale or package contain more than 15 per cent. of leaves suitable to wrap cigars, then the importer shall be compelled to pay $1.85 per pound, the higher rate of duty, on the entire bale or package, no matter what quantity of it is suitable for *filler* tobacco only.

The appellants contend that a proper construction of the statute in question fixes the duty on all bales of tobacco containing less than 15 per cent. of leaves suitable for wrappers for cigars, at 35 cents per pound, and on all bales of such quality as that the leaves suitable for wrapper in them exceed 15 per cent., at $1.85 per pound.

In construing the statute, the intent of the legislator must be ascertained, if possible, by the language of the statute itself. If it is unequivocal, plain, and expresses clearly what the legislative intent was, then the courts have no right to control or modify it by speculation, and there is no necessity for resorting to any rules of construction other than the clear meaning of the words used, unless there is ambiguity and the statute is susceptible of more

than one construction; but it frequently becomes necessary in order to arrive at the intent of the law-maker, to examine and consider repealed or expired acts *in pari materia* and to consider and examine the history of legislation affecting the same subject matter.

In re Southern Pacific Co., 82 Fed. Rep. 311-313.

We respectfully submit: *First*, that the plain language of the statute sustains our contention. *Second*, that the history of legislation upon this question shows very clearly the intention of Congress in using the language found in Sections 213 and 214.

The language of the statute is as follows:

"Par. 213. Wrapper tobacco, and filler tobacco, when mixed or packed with more than 15 per cent. of wrapper tobacco, and all leaf tobacco, the product of two or more countries or dependencies, when mixed or packed together, if unstemmed, $1.85 per lb.; if stemmed, $2 per lb.; filler tobacco not specially provided for in this act, if unstemmed, 35 cents per lb.; if stemmed, 50 cents per lb."

"Par. 214. The term wrapper tobacco, as used in this act, means that quality of leaf tobacco which is suitable for cigar wrappers, and the term filler tobacco means all other leaf tobacco."

Collectors of Customs shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, *of any leaf tobacco*, unless the invoices of the same shall specify *in detail* the character of such tobacco, whether wrapper or filler, its origin or quality.

In the examination for classification of any imported leaf tobacco, at least one bale, box or package in every ten and at least one in every invoice, shall be examined by the Appraiser or person authorized by law to make such examination, and at least ten hands shall be examined in each examined bale, box or package."

Tobacco is imported in bales, boxes or packages, and it has been heretofore decided that for the examination of tobacco for the purpose of arriving at its classification, the bale is the unit, and this, it seems, has not been questioned by the Honorable Judge of the Circuit Court.

See Erhardt v. Schroeder, 155 U. S. 124.
U. S. v. Rosenwald, 14 C. C. A.
U. S. v. Blumlein, 55 Fed. Rep. 383, 5 C. C. A. 142.

And if there should be any question that this was the intention of Congress, reference to the language of the statute itself would settle the matter.

The latter clause of Section 214 reads as follows: "In the examination for classification of any imported leaf tobacco, at least one *bale*, *box* or *package* in every ten, and at least one in every invoice, shall be examined by the Appraiser or person authorized by law to make such examination, and at least ten hands shall be examined in each examined bale, box or package."

It was clearly intended by Congress that tobacco, for the purpose of classification, should be grouped in bales, boxes or packages and that the single commercial package should be the unit upon which the classification or examination should be made. If this is true, there are two classes of tobacco subject to a duty of $1.85 per pound.

First. Wrapper tobacco.

Wrapper tobacco is that quality or character of tobacco as to be bought and sold and dealt in, at home and abroad, as *wrapper*. It is imported and handled in bales—not pounds, or leaves, nor hands—but in commercial packages called *bales*; and when Congress said *wrapper* tobacco, it meant a *bale of wrapper tobacco*—tobacco where *wrapper* was the predominating quality.

Second. One dollar and eighty-five cents a pound duty was imposed on certain grades of *filler* tobacco, viz: "Filler tobacco mixed or packed with more than 15 per cent. of wrapper."

Our contention is that the same unit, for examination, exists and is to be recognized in the examination of *filler* tobacco as in the examination of *wrapper* tobacco; and when an examination of a bale of filler tobacco shows that it is uniformly of a grade which carries mixed in it leaves suitable for wrapping cigars, over 15 per cent , while it does not make the bale a bale of *wrapper*, it imposes upon it the same duty as it imposed upon a bale of wrapper tobacco. But when an examination discloses that there is a percentage of leaves contained in the bale of *filler* less than 15 per cent., then the entire bale is, under the law, dutiable at 35 cents per pound.

If Congress had intended, as contended by the Government, that all leaves of tobacco suitable for *wrapper* for cigars, wherever found, should be dutiable at $1.85 per pound, then the language used in the statute—"and *filler* tobacco when mixed or packed with more than 15 per cent. of wrapper"—is wholly unnecessary and misleading. No fifteen per cent. clause need have been put in the law, and the importer whose bale of tobacco contained 10 per cent. of *wrapper* and 90 per cent. of *filler* could have paid his duties in accordance with its quality and, if the bale contained 20 per cent. of *wrapper* and 80 per cent. of *filler*, the same rule would have applied and he would have paid the higher rate of duty on whatever quantity of *wrappers* was found in his importation.

But under the rule imposed by the decision of Judge Lacombe, the Government collects $1.85 per pound on all *wrapper* leaves contained in a bale when the amount is less than 15 per cent., permitting the payment of the duty on the *filler* at 35 cents per pound; but, if the bale is of such quality that it contains 16 or 18 per cent. of *wrapper*, then duty is collected not only upon the wrapper so contained in the bale, but upon the remaining 82 or 84 per cent. which is contained in the bale which is admitted to be *filler*.

The Board of General Appraisers decided that, for the purpose of the assessment of duty, there were three kinds of tobacco.

First. Wrapper tobacco.

Second. Filler tobacco mixed or packed with more than 15 per cent. of wrapper tobacco.

Third. All other *filler* tobacco.

And this decision was based, not only upon the language of the statute itself and the testimony of the witnesses in the case, but upon the history of so-called tobacco legisiation and an examination of acts *pari materia*, beginning with the act of 1883.

We now come to the examination of the various acts of Congress imposing duties upon tobacco leading up to the act now before the Court.

The first tariff act which recognized the difference between *wrapper* and *filler* tobacco and imposed differential duties, was the act of 1883, paragraph 246, as follows:

"Leaf tobacco of which 85 per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than 100 leaves are required to weigh a pound, if not stemmed, 75 cents per pound; if stemmed, $1.00 per pound."

Under the liberal provisions of this act, as construed by the courts, a bale of tobacco, properly and honestly packed, might contain 84 per cent. of leaves suitable in fineness, texture, etc., for wrapper and yet be dutiable at 35 cents per pound, the *filler* rate then and now, Congress declaring, in effect, that unless a bale of tobacco was of such a grade or quality as to contain 85 per cent. of *wrapper* it should not be a *wrapper* bale. The line of demarcation between wrapper and filler was placed by the courts then at 85 per cent., and there it remained until the act of October 1st, 1890.

Act of October 1, 1890, Paragraph 242:

"Leaf tobacco suitable for cigar wrappers, if not stemmed, two dollars per pound; if stemmed, two dollars and seventy-five cents per pound; *Provided*, That if any portion of any tobacco imported in any bale, box or package or in bulk shall be suitable for cigar wrappers, the entire quantity of tobacco contained in such bale, box or package or bulk shall be dutiable, if not stemmed, at two dollars per pound; if stemmed, at two dollars and seventy-five cents per pound."

About the time of the passage of the act of 1883, wrapper tobacco began to be imported in considerable quantities from the Island of Sumatra, and between 1883 and 1890 the importation and use of this tobacco had increased enormously and was imported and used "*for wrapper purposes only;*" and the result of the act of 1883 was that all of those grades of Sumatra tobacco which did not come up to the standard of weight, texture, etc., prescribed in that act, even though it were wrapper tobacco and used for nothing else, came into this market at 35 cents per pound. And it was in order to correct this that paragraphs 242 of the act of 1890 was framed and passed.

The bale was still recognized as the unit, but the extent of the importation of tobacco from the Island of Cuba, Mexico and other points was certainly not contemplated by the framers of the McKinley bill.

It was found that a strict construction of this paragraph of the law of 1890 would absolutely prohibit the importation of all filler tobacco except of the very lowest grades and most inferior quality; and after a full hearing on the subject, the Board of U. S. General Appraisers, on the———day of————1892, made a decision that if a bale of tobacco of uniform quality honestly packed contained less than 15 per cent. of leaves which could be used for wrappers, said bale contained no portion of tobacco of the quality known commercially as "wrapper" and the entire bale was dutiable as "filler" at 35 cents per pound.

This decision made it possible to continue the manufacture of cigars in this country made of imported tobacco, and the conclusions of fact set out in this decision have never been questioned. The decision was recognized and followed until the law was repealed and was the first judicial decision as to the proper line between *wrapper* and *filler*, in uniformly and honestly packed *bales* of tobacco, and under it, all grades of *filler* tobacco could be imported.

We quote it in full, as follows:

(12526. G. A. 1210.)

HAVANA LEAF TOBACCO.

Before the U. S. General Appraisers at New York, February 8, 1892.

In matter of the protest, 12239b, of Emilio Pons & Co., against the decision of the Collector of Customs at Tampa, Fla., as to the rate and amount of duties chargeable on certain leaf tobacco, imported per *Mascotte*, January 12, 1892.

OPINION BY SHARRETTS, GENERAL APPRAISER.

The question presented for our consideration in this case is the dutiable character of certain unstemmed Havana tobacco, imported into Tampa, Florida, and classified by the Collector of that port as leaf tobacco containing a portion of leaves suitable for cigar wrappers. Duty was assessed on the tobacco thus classified at $2.00 per pound in accordance with the appropriate provision of paragraph 242, Act October 1, 1890. The importers claim that the tobacco is not suitable for wrappers, and is, therefore, dutiable at 35 cents per pound, under paragraph 243 of said

act. There is no contention that the tobacco was packed with fraudulent intent. The question at issue is, therefore, one of fact. Does the tobacco contain a sufficient quantity of leaves suitable for wrappers to bring it within the scope of the proviso to paragraph 242, which reads as follows:

That if any portion of any tobacco imported in any bale, box or package, or bulk, shall be dutiable, if not stemmed, at two dollars per pound.

The Board has heretofore held that the word "portion" must be held to mean an appreciable quantity, not an exceptional leaf, which has been legitimately packed in a bale, box or package. This ruling has, however, not led to a uniformity of practice at the several ports.

The Secretary of the Treasury, in order to secure a just and equitable determination of the scope of the proviso quoted, requested the Collector of the Port of Tampa, Florida, and experts employed by the Government to appear before the Board and present their views relative to the proper classification of Havana tobacco. In accordance with this request, the gentlemen named appeared before us and testified as to facts pertinent to the present case. Hon. E. R. Gunby, collector of customs at Tampa, made an intelligent and exhaustive statement as to the character of Havana wrapper and filler tobacco, which statement was confirmed by that of the Government experts and the testimony heretofore had by the Board of Importers of and Dealers in Havana Tobacco and Cigar Manufacturers located in New York City.

In accordance with the almost unanimous views expressed by the different parties named, we have reached the following conclusions:

(1) That there is a well-defined difference between Havana wrapper and filler tobacco that is easy of determination.

(2) That Havana wrapper tobacco is in such demand that it is valued at from about two to ten times that of filler tobacco, and is separately packed in Cuba with great care owing to this fact.

(3) That in the best-selected grades of Havana wrapper tobacco there is from 5 to 10 per cent. thereof that is

not suitable for wrapper and is used only for fillers for cigars.

(4) That in the better grades of Havana filler tobacco there is from 10 to 15 per cent. of tobacco that can be used for wrapper for cigars.

(5) That Havana filler tobacco of uniform kind, having 15 per cent. or less of leaves suitable for wrappers for cigars, is not recognized in trade as tobacco containing any portion suitable for wrappers for cigars and can not be profitably separated by larger tobacco dealers or cigar manufacturers, and the percentage, in our opinion, does not constitute an appreciable quantity.

(6) That there are bales of Havana tobacco known as self-working bales, containing over 15 per cent. of leaves suitable for wrappers for cigars, that are known in trade as part wrapper tobacco.

(7) That all Havana tobacco in bales or boxes or packages or in bulk, containing over 15 per cent. of leaves suitable for wrappers, is properly dutiable at $2.00 per pound under paragraph 242.

(8) That Havana wrapper tobacco, intentionally packed with filler tobacco in any bale, box, package or in bulk, and differing therefrom in color, length and quality, is evidence of fraud, and the contents of such bale, box or package, or tobacco in bulk, should be assessed with duty at $2.00 per pound.

(9) That Havana filler tobacco in bond ranges in value from 40 cents to $1.00 per pound.

(10) That the value of Havana wrapper tobacco in bond is from $1.80 to $6.00 per pound.

The above conclusions reached by the Board are in harmony with the views entertained by parties interested in protecting the growers of domestic tobacco. We quote from the address of the New York State Tobacco Growers' Association, (see Revision of the Tariff Hearings Before the Committee on Ways and Means, Fifty-first Congress, First Session, page 858):

The fact is that the line of difference between what is suitable for wrappers in Havana tobacco and filler is more distinct than between wrappers and fillers of any other grade. There is no similarity between Havana wrappers and any other goods in leaf tobacco; hence this talk of importers finding tobacco suitable for wrappers in Havana fillers is humbug.

It is further made to appear that the term any portion "suitable for wrappers for cigars" was designed to prevent the admission of Sumatra tobacco as fillers, which tobacco is suitable only for wrappers and is legitimately imported into the United States for no other purpose than as wrappers for cigars.

An exhibit of the tobacco in question was the subject of expert examination, and from the testimony relative thereto we make the following findings of facts:

(1) That the tobacco in semi-Vuelta, uniform in quality, length and color, and is of the kind known in trade as Havana filler tobacco, leaf, unstemmed.

(2) That it contains from 10 to 15 per cent. of leaves that can be used for wrappers for inferior cigars, but no portion thereof is of the quality known as wrapper tobacco.

(3) That it is of a kind used exclusively by larger manufacturers of cigars as fillers for cigars.

We hold that, within the meaning of the statute, there is no portion of the tobacco covered by this protest suitable for wrappers for cigars.

The protest is sustained.

We call the special attention of the Court to the language found in this decision, viz: That these conclusions were not only confirmed by the Government experts and the testimony had by the Board of Importers of and Dealers in Havana Tobacco and Cigar Manufacturers located in New York City, but were declared to be in harmony with the views entertained by parties interested in protecting the growers of domestic tobacco.

The Board further says that it is further made to appear that the term "in proportion suitable for wrappers"

was designed to prevent the admission of Sumatra tobacco as fillers, which tobacco is suitable only for wrappers and is legitimately imported into the United States for no other purpose than as wrappers for cigars.

Subsequently, the act of 1890, upon the return of the Democratic party to power, was repealed by the act of 1894, known as the Wilson Bill, and the tobacco schedule was contained in paragraphs 184 and 185.

ACT OF AUGUST 28, 1894.

Par. 184. Wrapper tobacco, unstemmed, imported in any bale, box, package, or in bulk, one dollar and fifty cents per pound; if stemmed, two dollars and twenty-five cents per pound.

Par. 185. Filler tobacco, unstemmed, imported in any bale, box, package or in bulk, thirty-five cents per pound; if stemmed, fifty cents per pound; *Provided*, That the term wrapper tobacco whenever used in this act shall be taken to mean that quality of leaf tobacco known commercially as wrapper tobacco; *Provided further*, That the term filler tobacco, whenever used in this act, shall be taken to mean all leaf tobacco unmanufactured, not commercially known as wrapper tobacco; *Provided further*, That if any leaf tobacco imported in any bale, box, package or in bulk shall be the growth of different countries, or shall differ in quality and value, save as provided in the succeeding provision, then the entire contents of such bale, box, package or in bulk shall be subject to the same duty as wrapper tobacco; *Provided further*, That if any bale, box, package or bulk of leaf tobacco of uniform quality contains exceeding fifteen per centum thereof of leaves suitable in color, fineness of texture, and size of wrappers for cigars, then the entire contents of such bale, box, package or bulk shall be subject to the same duty as wrapper tobacco.

Congress, being fully informed of the conditions of trade existing, not only expressly recognized the correctness of the decision of the Board of General Appraisers, heretofore quoted, but practically adopted its language in framing the tobacco schedule.

This act imposes a duty upon *wrapper* of $1.50 a pound in language as unequivocal as that in which the act of 1897 imposes a duty of $1.85 per pound on it, but Congress evidently understood clearly the conditions declared to exist

by the Appraisers in the Pons case, and gave its approval of that decision by a provision that if any bale or package contained more than 15 per cent. of wrapper it should pay the same duty as if it were a bale of wrapper. This proviso was not a penalty, nor in the nature of a penalty; it was the declaration of Congress, as it had been of the Board of Appraisers, that a bale of tobacco that was uniformly of a grade high enough to produce exceeding fifteen per cent. of wrapper, belonged, not to the *filler*, but to the *wrapper* class, and should pay duty accordingly. We call the attention of the Court especially, however, to the fact that this act went further and defined wrapper tobacco to be that quality of leaf tobacco known "commercially" as wrapper.

It is not surprising that there were complaints of evasions of duty under the Wilson bill, and they arose because of the very liberal language used by Congress in defining wrapper tobacco. Tobacco *commercially known as wrapper*, is packed, bought and sold in *bales of wrapper* and not in *filler bales*, and though bales may contain more than 15 per cent. of wrapper or wrapper leaves, as long as the filler is the predominating quality in the bale, it is not known in the market, or *commercially known*, as wrapper. Therefore the use of the words, "commercially known as wrapper," resulted in very liberal appraisements of Havana and Mexican tobacco at the custom houses.

The Dingley bill, which contains the paragraph now before the Court for construction, makes several changes in the tobacco schedule, the first and most important of which is that resulting from the political policy of the party in power, viz: An increase in the rate of duty, and wrapper tobacco instead of paying $1.50 a pound is increased in rate to $1.85 per pound.

The next material change in the language is that the term *wrapper* tobacco, as used in this act, means *that quality of leaf tobacco which is suitable for cigar wrappers;* thus leaving out the language complained of as being too liberal, viz: "commercially known as wrapper."

The so-called 15 per cent. clause which was contained in the Wilson bill was reinserted in the Dingley bill in clearer and more concise language, and the intention of its

use at all could not have been for any other purpose except to permit the importation of grades of tobacco containing less than 15 per cent. of wrapper at the filler rate of duty.

Indeed, there seems to us to be no reason for the language used in section 213 except that it was intended to have put upon it the construction that we have given it. If, as is claimed by the Government, it was the intention of Congress to impose a duty of $1.85 per pound on all wrapper tobacco, wherever found, and a duty of 35 cents a pound on all filler tobacco, wherever found, no reason can be given why any reference should have been made to filler tobacco "when mixed or packed with more than fifteen per cent. of wrapper tobacco." A clear and concise statement that wrapper tobacco should pay a duty of $1.85 per pound, and filler tobacco should pay 35 cents per pound, wherever found, would have been fair both to the Government and to the importer and the latter would not have had the slightest reason for complaint. If the law had been so framed, the importer could have paid duty on his tobacco in the proportion in which the bale was found to contain wrapper and filler tobacco. If a bale of tobacco was found to have ten per cent. of wrapper and ninety per cent. of filler, the duties would have been collected accordingly, and the same rule would have applied had the bale contained sixteen per cent. of wrapper and eighty-four per cent. of filler. But the construction placed upon this law by the Government and by the decision of Judge Lacombe, of the Circuit Court, requires the importer to pay a duty of $1.85 per pound upon all wrapper contained in any bale until it exceeds fifteen per cent.; but should a bale contain sixteen per cent., he is compelled to pay $1.85 a pound, *not only upon the sixteen per cent. of wrapper contained in the bale, but also upon the eighty-four per cent. admitted to be filler* which makes up the balance of the bale.

Congress could not have contemplated or intended a construction so contrary to every principle of right and of justice; and it seems to us that if there were no history of legislation by which the intent of Congress might be arrived at, the absurdity of the construction put upon the statute by the Government would of itself be sufficient to satisfy the Court that the Government's construction can

not stand and was not contemplated by the lawmaker.

We respectfully insist that the opinion and conclusion rendered by the Honorable Judge of the U. S. Circuit Court for the Southern District of New York is entirely erroneous, and we contend that the error of law was the result of erroneous conclusions of fact reached by the eminent Judge.

In his decision Judge Lacombe says: "The McKinley tariff of 1890, however, concededly abandoned the practice of taxing according to percentages. Under that act it was wholly unnecessary to fix upon any base number or unit at all. Quite possibly the percentage method was restored by the Wilson tariff of 1894, indirectly, by the use of the words "*commercially known.*" But there seems much force in the suggestion that when those words were dropped out of the Dingley tariff of 1897, the percentage system dropped with them. Of course, if the percentage system were abandoned, the necessity of determining a unit or base number ceased also, and the decisions in the cases cited would be no longer instructive."

Surely, the use of the words "*commercially known as wrapper*," in the Wilson bill, had no bearing whatever upon what the learned judge calls the *percentage question.* The act of March 3, 1894, has a provision that the term *wrapper tobacco*, wherever used in this act, shall be taken to mean that quality of leaf tobacco *known commercially as wrapper tobacco.*

This provision is entirely separate and distinct from the percentage provision. It applies with equal force to a *whole bale, a half bale, or five per cent. of a bale;* it simply defines what shall be considered *wrapper tobacco* in construing the law.

But the further provision of Paragraph 185 is, that "If any bale, box, package or bulk of leaf tobacco of uniform quality contains exceeding fifteen per cent. thereof of leaves suitable in color, texture, etc., for wrapping cigars, then the entire contents of such bale, box or package shall be subject to the same duty as wrapper tobacco."

This last provision was construed to mean that if any bale, box or package of leaf tobacco contained fifteen per cent. or less of leaves suitable for wrapper, then the entire bale should be subject to duty as *filler tobacco*, and was en-

tirely distinct from the provision which defined what was wrapper.

The conclusion of the judge that the percentage system was abandoned, and, therefore, there was no necessity for a unit or base number, must be erroneous, inasmuch as every bale of tobacco examined under the Dingley bill and found to contain three, six, or ten per cent. of wrapper, or any quantity suitable for wrapping cigars, is taxed as *wrapper*, in proportion to the percentage thereof found in the whole bale; and, by virtue of the decision itself which permits the levying of a duty upon percentages ranging from 1 and $\frac{133}{577}$ of a bale to 3 and $\frac{133}{666}$ of a bale, it is rendered absolutely essential that a percentage should be calculated on each bale, and that there should be a bale or unit upon which it is calculated. Therefore, it seems that the conclusion of the learned Judge that the percentage system was dropped is in direct conflict with his conclusion that the higher rate of duty may be collected upon percentages less than fifteen.

Again, the Court says: "I am strongly of the opinion that, except for the purpose of imposing a penalty on anyone importing an abnormal bale, (i. e., as the evidence shows, one with more than fifteen per cent. of wrapper to less than eighty-five per cent. of filler) any percentage system is abandoned in this tariff, and that all wrapper tobacco, wherever found and in whatever amount, shall pay the higher rate."

Here again the Court declares the abandonment of the percentage system, except for the purpose of imposing a penalty upon anyone importing an abnormal bale. There is not the slightest evidence, nor is there anything in the decisions of the tobacco cases, to show that a bale of tobacco, uniformly and properly packed, which contains more than fifteen per cent. of wrapper tobacco to eighty-five per cent. of filler, is an abnormal bale. On the contrary, the law of 1883 recognizes that a bale of tobacco might contain eighty-five per cent. of wrapper and fifteen per cent. of filler, and not be an abnormal bale. No bale of tobacco is an *abnormal* bale unless it is, intentionally, and for the purpose of defrauding the revenue, packed with two or more separate and distinct grades of tobacco; and the examination provided for by the statute, viz: "*ten*

hands in each bale, box or package examined," (see paragraph 214) is for the purpose of ascertaining whether or not the bale is uniformly and honestly packed, in a proper commercial way.

The conclusion that Congress intended to prescribe a penalty for the importing of a bale of tobacco of such a grade that more than fifteen per cent. of it was wrapper, is untenable, inasmuch as the importation of such a bale is nowhere prohibited by law, but, on the contrary, is distinctly provided for, and provided for because of the fact that Congress understood clearly that the high grades of Havana tobacco imported for the manufacture of cigars frequently contains more than fifteen or twenty per cent. of wrapper tobacco, and, therefore, made the distinct declaration that tobacco of these grades should be considered as bales of wrapper tobacco and pay duty accordingly.

The learned Judge, in his opinion, has based his conclusion that a bale of tobacco with more than fifteen per cent. of wrapper to less than eighty-five per cent. of filler is an abnormal bale, upon the evidence introduced in this cause before the Board of General Appraisers.

We respectfully submit that there is nothing in the evidence which shows that a bale containing more than fifteen per cent. is an abnormal bale. But the evidence does show conclusively that a small percentage of wrapper leaves in a bale, while if they are separated they could be used for wrapping cigars, can not be manipulated in the trade in such a way as to be used for wrappers by any factory. The weight of the evidence shows that no wrappers are obtained out of any bale that contains less than ten per cent. of wrapper leaves. But even the evidence introduced by the Government, viz: that of Mr. Albert T. Dennerly, is clear that unless a bale of tobacco contains more than five per cent. of wrapper no manufacturer could get any wrappers out of it whatever, as it would not pay to select such a small quantity out of a bale.

This is an additional reason for the belief that Congress did not intend that the importer should pay wrapper duty on such small percentages of wrapper tobacco in a bale.

It seems to us entirely unnecessary to quote to this Court the ordinary rules for its guidance in the construc-

tion of statutes. The Court is thoroughly familiar with them. They are elementary and there are no new or unusual ones to be invoked in the construction of the statute in question in this case.

In conclusion, we simply call to the attention of the Court the fact that tobacco is an agricultural product, and it is utterly impossible that it should be found to be of an absolutely uniform kind, quality, color, texture and size. It is not made by machinery, nor cast in molds, and it must be selected on the farms and in the packing house with the best judgment and care of those people who have devoted their time and talents to becoming expert in their particular line of business.

Congress recognized, and this Court will recognize that there must be variations of grade and quality; and as tobacco is packed in the fields, the same conditions attach to it as to the gathering of corn, of apples, of oranges, and other agricultural products. The grades run from the lowest scrap to the highest and most perfect wrapper, and Congress recognized this when it said that bales of tobacco, such as are sold in the markets of the world, in proper commercial packages, of such quality that they carry mixed together wrapper and filler a quantity of leaves suitable to wrap cigars less than fifteen per cent., are filler bales, and dutiable as filler, while those exceeding fifteen per cent. of wrapper belong to a grade high enough to be classed as all wrapper, and shall pay duty accordingly. Even with this construction, the Government takes the eighty-five per cent. to the importer's fifteen per cent., and it seems that this difference ought to be sufficient to protect the Government in every dollar of duty due to it, and the tobacco schedule is severe enough on the importer with this construction.

In the manufacture of high-grade cigars in the United States, (and the business is a very extensive one) it is necessary that high-grade tobacco be used in order to keep up the standard of the cigars made by our manufacturers. To do this, they are compelled whenever a bale of tobacco contains more than fifteen per cent., even though it be sixteen or seventeen per cent., to pay wrapper duty on the entire bale; and it seems a very slight compensation, if the bale contains less than fifteen per cent., to permit its im-

portation at a duty of thirty-five cents per pound on the entire bale.

Should there be any doubt, however, in the mind of the Court as to what the intent of Congress actually was, we beg to say that, as a matter of law, "it is a well settled rule in the construction of statutes levying taxes or duties, that they shall in every case of doubt be construed most strongly against the Government and in favor of the citizens or subjects, and their provisions are not to be extended beyond the clear import of the language used." (See U. S. v. Wigglesworth, Second Story, page 369.) Justice Story, in the above cause, using the exact language quoted, and saying in addition thereto "that revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and therefore are not to be liberally construed."

Respectfully submitted.

EDWARD R. GUNBY,

Attorney for Appellees.

No. 59.

Sty. of Cookingham

Office Supreme Court U.S.
FILED
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JAMES H. MCKENNEY, Clerk.

Filed Oct. 17, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59

ROTHCHILD & BROTHER,
Appellants,

AGAINST

THE UNITED STATES,
Appellee.

CERTIFICATE OF APPEAL TO THE SUPREME COURT FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HENRY J. COOKINHAM,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 298.

ROTHCHILD AND BROTHERS,
Appellants,
against
UNITED STATES,
Appellee.

Brief for Appellants.

This case is here by certificate from the United States Circuit Court of Appeals for the Second Circuit.

The question is the construction of a statute and the subject matter is leaf tobacco.

Before entering into a discussion of the questions it is well to have before the court certain well known facts, and those which Congress will be presumed to have known when the statute to be construed was enacted.

Congress is presumed to have known that leaf tobacco is an agricultural produce; that it is packed in bales, boxes or other packages and imported, classified and dealt in in such packages; that there is a classification known as "wrapper," and also as "filler" tobacco, and that this classification is made upon bales as such; that the tobacco

known as " filler " is used for the body of cigars and the " wrapper " to encompass it to hold the " filler " together and give the cigar the proper appearance to make it salable. In some instances the filler is surrounded first with a " binder " before the " wrapper " is applied.

It is also a well known fact that, in every bale of wrapper tobacco, there is a portion which is not suitable for wrapping cigars; that this portion varies from a small per cent. to fifteen per cent.; that in some tobacco packed, imported and intended as filler there is a small quantity that may be used for wrapping cigars. It is also a fact that no expert can tell by examining the tobacco exactly what portion of any bale is suitable for wrapper. This can only be ascertained by manufacturing the tobacco into cigars. That after a careful selection of wrapper, by an expert, and the manufacturing of such tobacco into cigars a certain per cent. of the cigars must be rejected as unmarketable for the reason that the wrappers are not suitable.

The serious controversy concerning the classification of leaf tobacco arose some time in 1889.

In this discussion we will treat the subject as far as possible in chronological order. Let us commence with the year 1890.

Specific instructions were given by the Secretary of the Treasury, January 27th, 1890, in regard to the method of examining leaf tobacco under the laws of 1883. Directions were given that at least one " bale " in each invoice should be sent to the public store for examination.

*Letter of George C. Tichnor, Assistant Secretary to Collectors of Customs, Synopsis of Decisions Treasury Department, No.*9824.

On September 4th of the same year the Treasury Department again wrote the Collector of New York and stated that the protestants claimed "that the leaf, the "hand, the bale, and the entire importation should be "taken as a unit indicated by the eighty-five per cent. "clause."

Thus it will be seen that the question of the unit for assessment was raised early in the history of the litigation.

Controversies concerning classification of merchandise prior to 1890, were disposed of, generally, summarily, except in rare instances when resort was had to suits in the courts of law. June 10th, 1890, Congress passed the act known as Chapter 407, of the Laws of 1890, entitled "An Act to simplify the laws in relation to the collection "of revenues." By this act the Board of General Appraisers was constituted; and under its authority, the President appointed very eminent and able men members of the Board. A new method of determining controversies concerning the collection of customs was inaugurated. At first there was less formality in determining these questions than there is to-day. Prior to the decision by the Board in the case at bar, the practice had become fixed and cases were tried before the Board in the same manner as a case is tried in the United States District or Circuit Court. The Board rendered its decisions, generally, by written opinions, assigning the grounds upon which the decisions were based. These opinions will compare favorably with those of any of the courts of the land, whether federal or state.

After a careful examination of every case wherein the questions were the same as those involved here, we submit the following observations to show how the Government has understood and treated the subject. We do this

for the purpose of showing later that Congress intended to do precisely what is contended for by the appellants.

When the board commenced passing upon the questions concerning the duty upon leaf tobacco this court had decided Falk v. Robertson, 137 U. S., 225, and Schroeder v. Erhardt, 155 U. S., 124. These cases had been decided under the act of March 3rd, 1883, United States Statutes at large, vol. 22, page 488. We will first consider this act, the material part of which is as follows:

"Leaf tobacco of which 85 per cent. is of the requisite "size and of the necessary fineness of texture to be suit- "able for wrappers, and of which more than one hun- "dred leaves are required to weigh a pound, if not stem- "med, 75c. per pound; if stemmed, $1.00 per pound."

"All other tobacco in leaf, unmanufactured, and not "stemmed, 35c. per pound. Tobacco, manufactured, of "all descriptions, and stemmed tobacco not specially enu- "merated or provided for in this act, 40c. per pound. "Snuff and snuff flour manufactured of tobacco, ground, "dry, or damp, and pickled, scented or otherwise, of all "descriptions, 50c. per pound. Tobacco unmanufactured "not specially enumerated, or provided for in this act, 30 "per centum ad valorem."

In Falk v. Robertson, and Erhardt v. Schroeder, this act was construed with reference to the peculiar facts in those cases. Let us briefly consider them.

In the case of Falk, Blatchford, speaking for the court, says: "That prior to 1883 leaf tobacco was "bought and sold under different names; that bales of "leaf tobacco in the trade were as a rule homogeneous as "to their contents, each one consisting of only one of "these three classes."

Unquestionably the general statement is correct that tobacco was, prior to 1883, baled, bought and sold in the manner as stated by the learned Judge. And so it still is. Tobacco, in leaf, is to-day bought and sold in "wrapper" and "filler" bales. This is the universal custom. Merchants use these terms, invariably, in connection with importation and buying and selling tobacco in quantity. Nothing has occurred since the act of 1883 in the trade, generally, to change the method of handling leaf tobacco. The only incidents in the history of the subject that, in any way, change the aspect as we understand it, is that some importers have corruptly undertaken to evade the revenue laws by packing and importing tobacco dishonestly. This practice of a few dishonest importers should not be taken as having any bearing upon the general custom among those in trade who deal honestly.

Experts in leaf tobacco vary materially in making estimate of the amount of leaf tobacco in a bale suitable for wrapper. Take for instance the case at bar. It does not require any stretch of the imagination to conclude that one expert might have examined the four bales of tobacco in this case and found no tobacco suitable for wrapping cigars. The Custom House officer who made the examination, having equal ability and honesty of purpose, might make the examination and determine the per cent. of tobacco suitable for wrapper in those bales as reported. There is a wide field for honest difference of opinion. The tobacco was honestly packed and honestly imported as filler tobacco. Under what other class could the importers have entered it in the Custom House? When this tobacco is put upon the market it is offered for sale, not as wrapper nor as part wrapper and part filler; it is offered for sale as *filler* tobacco, sold as such, bought as such, used as such. How then can it be said that in the

commercial world this tobacco is to be treated as part filler and part wrapper and that duties are to be assessed upon it accordingly?

Falk against Robertson was substantially a "moot" case. The importers, by arrangement with the custom house officers, imported the tobacco in bales, each of which contained a quantity of Sumatra leaf tobacco, answering the description in the statute of that dutiable at seventy-five cents per pound, except that it formed only about eighty-three per cent. of the contents of the bale. The rest of the bale consisted of inferior leaf tobacco called "filler," which was separated from the seventy-five cent tobacco by strips of paper or cloth, making the one kind readily separable from the other on the opening of the bale.

The question in this case was, solely, how this tobacco thus packed should be classified. The court laid down no general rule, but held that this particular tobacco packed in an unusual manner should be classified as wrapper and that a bale of this description was not a unit for assessment. We can see no reason why this case has any bearing upon another case where the facts are entirely different. As, for instance, where a shipment of tobacco, honestly packed in bales and imported as filler, in which bales *intermingled* with the filler tobacco there are an occasional leaf of tobacco suitable for wrapper.

In the case of Erhardt vs. Schroeder, the court dealt with an importation of Sumatra tobacco and held that in view of the facts in that particular case the bale was not the unit. The court said, on page 133, upon the subject of the bale being a unit that, "the proper answer to this "question seems to depend upon the particular circum- "stances of a given case . . . . All the tobacco in "question in this case, as the evidence on both sides

" shows, was raised in the same country and was all of " the class known as wrapper. Therefore, any bale, or " indeed the whole invoice, if it might conveniently be " treated as a whole for the purpose, was just such a unit " as was intended by the statute."

We understand this to mean that the whole importation was *wrapper* and it made no difference what the unit was as the result would be the same if the wrapper tobacco in every bale exceeded fifteen per cent. It is notable that this importation was of the class known as " wrapper tobacco." It was treated as such by the importer and the court held that, as it was of the wrapper class, it was dutiable as such. It does not seem that this case would be controlling in a case where the facts were different. Take the following case for instance: If an entire importation was of filler tobacco, honestly and regularly packed, and there was a small per cent. of wrapper leaves, not exceeding 15 per cent., commingled with filler in each of the filler bales, would not those bales, or the entire importation, be the unit of quantity for appraisal? And should they not all be classified as filler? To put any other construction upon the statute of 1883 would render it impossible of enforcement. To eliminate the idea that neither the bale nor the entire quantity was the unit of assessment on bales honestly and regularly packed requires that wrapper duty be assessed upon every leaf which might be contained in any bale of filler tobacco, although it might not amount to one tenth of one per cent. This conclusion is inevitable. If not so, then there must be a dividing line and some limit of per cent. must be fixed below which the quantity of wrapper tobacco in a bale will not be considered. What shall this limit be? As soon as we open this door uncertainty is introduced. One Secretary of the Treasury may say the limit shall be one per cent.; another may say it may be

ten per cent. The Board of General Appraisers, after thorough investigation, and under a statute more stringent than this, said it might be any per cent. below fifteen in a bale before it was an appreciable amount. The government accepted this as the practical solution of the difficulty, as we shall show later on in this argument. On leaving the Schroeder case we do it with the remark that the court laid down no general rule, uttered no dictum, but applied the law to the peculiar facts in that case.

I have not been able to find any decisions by the Board under this act of 1883, in which the question involved is the classification of leaf tobacco.

There had been, however, controversy over the subject and the importers had "respectively and severally, "claimed . . . . . that the leaf, the hand, the "bale, and the entire importation should be taken as the "unit of the quantity indicated by the 85 per cent. clause."

S. T. T. D., 10,232, *Sept. 4th*, 1890.

The next important step in the history of the controversy was the enacting of Chapter 1244 of the Laws of 1890, entitled "An act to reduce the revenue and equal-"ize duties on imports and for other purposes," known as the McKinley Act. The provisions of this act regarding leaf tobacco read as follows:

"242. Leaf tobacco suitable for cigar wrappers, if not "stemmed, two dollars per pound; if stemmed, two dol-"lars and seventy-five cents per pound; provided, that if "any portion of any tobacco imported in any bale, box "or package, or in bulk, shall be suitable for cigar wrap-"pers, the entire quantity of tobacco contained in such "bale, box, or package, or bulk, shall be dutiable; if not "stemmed, at two dollars per pound; if stemmed, at two "dollars and seventy-five cents per pound."

"243. All other tobacco in leaf, unmanufactured and "not stemmed, thirty-five cents per pound; if stemmed "50c. per pound."

In the light of the above decisions in the Falk and Schroeder cases, but under the McKinley Act, the board passed upon the question of the classification of leaf tobacco. The first case was Garcia & Co., (No. 11,217, Synopsis Decisions, Treasury Department, May 8th, 1891.) The board said: "From the testimony we find that *no appre-* "*ciable portion* of the tobacco in question was of such size "and quality and fineness of texture as to be suitable for "cigar wrappers."

There is, here, a clear implication that there was some tobacco in the bales suitable for wrapping cigars.

In 11,231, S. D. T. D., Haas Bros., May 12th, 1891, the board again passed upon the same question and in precisely the same language.

The next case was No. 12,329, Liebes Bros. & Co., Dec. 19, 1891. This case is not very important, except to note the fact that the importation was of Sumatra tobacco; that it was entered as all "filler," and the Board found that it was mostly "wrapper." In arriving at that result the board undoubtedly based its decision upon the same unit. The Government accepted the construction as announced by the Board in the above cases as no appeal was taken.

Next in order of time is the famous Pons case, No. 12,526, S. D. T. D, Feb. 7th, 1892. Prior to the decision in this case, and in the light of the Falk and Schroeder cases, the Board had decided that unless there was an "*appreciable portion*" of wrapper tobacco in a bale it was not to be assessable as such. In this case the Board went still further and fixed a limit to this "appreciable por-

tion." Among other things it held "that Havana filler "tobacco of uniform kind, having 15 per cent. or less of "leaves suitable for wrappers for cigars, is not recognized "in the trade as tobacco containing any portion suitable "for wrappers for cigars and cannot be profitably sepa- "rated by larger tobacco dealers or cigar manufacturers, "and the percentage, in our opinion, does not constitute "an appreciable quantity."

It is a well known fact that Havana tobacco is the best in the world. If 15 per cent. or less of wrapper tobacco in a bale of Havana tobacco was not an "appreciable "portion" of this tobacco, certainly it would not be an *appreciable quantity* of an inferior grade of tobacco.

Let us look a little further into the history of this subject and see how the Government treated it. In the first place no appeal was taken from the decision in the Pons case. It must be presumed, therefore, that the government was, at the time, satisfied with the construction. But, an unforseen difficulty afterward arose in connection with this case. The Minister of the Netherlands called upon the Secretary of State in regard to the case and that officer made inquiry of the Secretary of Treasury concerning it. This inquiry was answered by Secretary Foster, May 7th, 1892, (S. D. T. D., 12,745.) Among other things he said: "By reference to the decision in "question (copy enclosed herewith), it will be seen, that "while the Board of General Appraisers found the "tobacco imported by Mr. Pons to contain from 10 to "15 per cent. of 'leaves that can be used for wrappers "for inferior cigars,' it also found that no 'portion "thereof is of the quality known as wrapper tobac- "co,' and consequently that 'within the meaning of "the statute there is no portion of the tobacco covered by "this protest suitable for wrappers for cigars.' This de-

" cision, therefore, does not necessarily lead to the ad-
" mission at the lower rate of duty of Havana tobacco in
" leaf containing any portion 'suitable for cigar wrappers'
" within the meaning of said paragraph, but merely as-
" serts as a finding of fact that the tobacco under con-
" sideration did not contain any such portion."

This reference to the decision by the Secretary of the Treasury answered the purpose for which it was written, but we submit the decision was much broader than claimed for it by the Honorable Secretary. For, the Board had founded its decision upon the ground that, unless the leaf tobacco, in a bale, suitable for wrapper, exceeded 15 per cent. it was not considered.

Again the Board passed upon the question in No. 13, 434, S. D. T. D. Magee, Sept. 29th, 1892, and in substance reaffirmed what had been held in the Pons case. The government took no appeal. An important incident in the history of the litigation upon this subject occurred at this junction. C. S. Hamlin, Assistant Secretary of the Treasury, on June 12th, 1893, (S. D. T. D. 14,096) addressed a letter of instruction to the collector at the port of New York in which he sets forth the important part of the opinion of the Circuit Court of Appeals in the case of A. Blumlein & Co. This decision was made under the act of 1883. It set forth clearly two points.

First, that the act of Congress " plainly contemplates
" the importation of tobacco of mixed grades and pro-
" vides that when it is thus mixed and eighty-five per
" cent. of it is of the higher grade, such mixed lot shall
" pay seventy-five cents per pound on all tobacco therein
" contained, whether of higher or lower grades. If the
" lot does not contain eighty-five per cent. of the higher
" grade the entire lot is to pay the lower duty."

"Second. That the bale was the unit for assessment."

The learned Secretary of the Treasury understood this decision, was satisfied with it, and in this letter directed settlement of the case to be made upon the basis of the decision. Thus by the affirmative act of the government it assented to the two propositions above stated.

It will be noted that this decision was made under the act of 1883. On August 11, 1893, the same officer who had written the letter concerning the Blumelein case issued a circular of instruction to collectors (S. D. T. D. 14,274) in regard to the same subject under the law of 1890. In this letter the acting secretary refers to the Pons case and says that the government did not appeal, but that it relied upon the thoroughness of the examination by the Board. He proceeds then in this circular to give instructions different from the rule laid down in the Pons case.

It is evident that soon after this circular was issued the government realized it had erred in giving these instructions; for, on October 7th, 1893, the Treasury Department issued circular of instructions No. 14,423, S. D. T. D., which reads as follows:

"Treasury Dept., October 7, 1893.

"To Collectors and other Officers of Customs:

"In order to establish uniformity in the classification "of tobacco imported at different ports, the following "rules are hereby prescribed for the guidance of col- "lectors of customs in applying the provisions of para- "graph 242 of the tariff act:

"The paragraph above cited provides 'that if any "portion of any tobacco imported in any bale, box, or

"package, or in bulk, shall be suitable for cigar wrap-
"pers, the entire quantity of tobacco contained in such
"bale, box or package, or bulk, shall be dutiable; if not
"stemmed, at two dollars per pound; if stemmed, at two
"dollars and seventy-five cents per pound.'

"A doubt has arisen at some of the ports as to the
"exact signification of the term 'suitable for wrappers,'
"as used in the paragraph referred to. As a matter of
"fact, it might be possible to apply some leaves in almost
"any package of tobacco to use as wrappers, and a literal
"interpretation of the language of the law might justify
"the exaction of the higher rates of duty upon most of
"the tobacco imported into this country.

"It is hardly necessary to point out the inadmissibility
"of any interpretation which perverts and defeats the
"intention of Congress. The provision referred to is in-
"tended to prevent the willful admixture with filler to-
"bacco of that which is meant for use as wrappers with
"the direct purpose of defrauding the revenue. The
"presence, therefore, in a package of filler tobacco of any
"tobacco which, although capable of use as wrappers for
"inferior and cheap cigars, is not commercially recognized
"in the trade as wrapper tobacco, should not determine
"the classification of the whole package. It is only such
"tobacco, of whatsoever grade, as is commonly and com-
"mercially known as 'wrapper tobacco,' which is referred
"to in paragraph 242 as 'suitable for wrappers.'

"In circular No. 124 the department instructed
"officers of customs that it could not acquiesce in the
'establishment by the Board of General Appraisers of any
"maximum percentage of wrapper tobacco which would
"relieve the merchandise from classification as filler
"tobacco. The law does not establish any such definite
"limit, nor will it bear such a liberal construction; it

"provides that the inclusion of 'any portion' of wrapper "tobacco in a package of alleged filler tobacco shall "subject the entire quantity contained in such package "to classification at the higher rate. The discussions in "Congress in regard to the provision just cited clearly "show that its object was the frustration of all attempts "at evasion of the duty by the intentional mingling of "different classes in the same package. It would be "manifestly, however, a strained construction of the law "to classify the whole contents of a package as wrapper "tobacco merely because of the incidental commingling "of stray leaves of a quality or size suitable for possible "use as wrappers. Such an interpretation would be "prohibitive of all importations of filler tobacco, whereas "the provision is to be administered not as an unreason-"able and oppressive measure, but as a wise precaution "against fraud. Unless tobacco, commercially recognized "as wrapper tobacco, is designedly packed with filler "tobacco in such a way as to render it difficult of "detection, it should not (unless in what would be "commercially regarded as an appreciable quantity) "interfere with the classification of the package as filler "tobacco.

"In the absence of any specific limitations to the word "'portion' as used in the statute, collectors and appraisers "ing officers should be governed by the views above "set forth, which, while rejecting the arbitrary "line proposed by the Board of General Appraisers, "allow a reasonable margin for such slight admixture of "grades and qualities as may happen incidentally.

"Charles S. Hamlin,
"Acting Secretary."

The construction of this act of 1890 by the secretary in this letter is reasonable and except in one particular is just

what we contend for here in regard to the act. He rejects the idea of the fifteen per cent. limitation. In every other respect his construction is what we deem the correct one in order to carry out the intent of Congress. Attention is called to the fact that the secretary states that "the provision referred to (Section 242 of 1890) is "intended to prevent the *willful* admixture with filler "tobacco and that which is meant for use as wrapper with "the direct purpose of defrauding the revenue." This is precisely what we contend for in regard to this act.

It is well said here, by the secretary, that, to put a literal construction upon the act of 1890 would be prohibitive of the importation of filler tobacco. To put a reasonable construction upon the statute, as is contended for by the Honorable Secretary, would be to permit tobacco packed and imported in good faith as filler to come into the country on filler duty, although a certain per cent. of tobacco suitable for wrapping cigars was found in every bale.

Next in order of time is the Wilson Act, Chapter 349, Laws of 1894, which reads:

"184. Wrapper tobacco, unstemmed, imported in any "bale, box, package, or in bulk, one dollar and fifty cents "per pound; if stemmed, two dollars and twenty-five "cents per pound.

"185. Filler tobacco, unstemmed, imported in any "bale, box, package, or in bulk, thirty-five cents per "pound; if stemmed, fifty cents per pound: Provided, "That the term wrapper tobacco, whenever used in this "Act shall be taken to mean that quality of leaf tobacco "known commercially as wrapper tobacco: Provided fur-"ther, That the term filler tobacco, whenever used in this "Act, shall be taken to mean all leaf tobacco unmanufac-

"tured, not commercially known as wrapper tobacco:
"Provided further, That if any leaf tobacco imported in
"any bale, box, package, or in bulk shall be the growth
"of different countries, or shall differ in quality and value
"save as provided in the succeeding provision, then the
"entire contents of such bale, box, package, or in bulk
"shall be subject to the same duty as wrapper tobacco:
"Provided further, That if any bale, box, package, or bulk
"of leaf tobacco of uniform quality contains exceeding
"fifteen per centum thereof of leaves suitable in color,
"fineness of texture, and size for wrappers for cigars, then
"the entire contents of such bale, box, package, or bulk
"shall be subject to the same duty as wrapper tobacco:
"Provided further, That collectors shall not permit entry
"to be made, except under regulations to be prescribed
"by the Secretary of the Treasury, of any leaf tobacco
"imported in any bale, box, package, or in bulk, unless
"the invoices covering the same shall specify in detail the
"character of the leaf tobacco in such bale, box, package,
"or in bulk, whether wrapper or filler tobacco, Quebrado
"or self-working bales, as the case may be: And Pro-
"vided further, That in the examination for classifi-
"cation of any invoice of imported leaf tobacco at least
"one bale if less than ten bales and one bale in every
"ten bales and more, if deemed necessary by the ap-
"praising officer, shall be examined by the appraiser or
"person authorized by law to make such examination,
"and for the purpose of fixing the classification and
"amount of duty chargeable on such invoice of leaf to-
"bacco the examination of ten hands out of each exam
"ined bale thereof shall be taken to be a legal examina-
"tion."

No. 15,586, S. D. T. D. Garcia, December 27th, 1894, was the next case. The importance of this decision appears in that it was the first one under the act of 1894.

The Board in this case said "there are also certain grades "of tobacco known as working up stock, the trade term "meaning such a bale as would furnish sufficient wrap- "pers to work up the bale, using the remainder for filler, "and these, although not commercially wrapper bales, if "manufactured in their fresh condition would produce a "good percentage of wrapper."

We have here the construction of a new act; and, the Board, following in the line of the decisions under former acts, puts a reasonable and practical construction on the statute. It holds, in substance, that there may be a certain quantity of wrapper tobacco in a bale which Congress intended should pay filler duty.

In the next case, No. 15,692, S. D. T. D., El Paso Cigar Manufacturing Company, January 23, 1895, decided under the act of 1894, the Board said: "It is well "known that, in commercial transactions relating to to- "bacco, the bale is the unit, and the legislation of Congress "was made with reference to that fact. The tariff act of "August 28th, 1894, leaves less room for doubt on this "question than the two acts which preceded it. Here "we find in paragraph 185 the provision that the term "wrapper tobacco, whenever used in this act, shall be "taken to mean that quality of leaf tobacco "known commercially as wrapper tobacco. It would be "unreasonable to suppose that any tobacco containing "over four per cent. of wrapper would be considered "commercially to be wrapper tobacco, and, by a further "provision, it is only when any unit of leaf tobacco of "the uniform quality contains exceeding fifteen per cent. "thereof of leaves suitable in color, fineness of texture and "size for wrapping cigars that such unit shall be sub- "jected to the same duty as wrapper tobacco."

The next case is No. 16,535, S. D. T. D. Bernheim &

Sons, Oct. 1st, 1895, Law of 1894. In this case the protest of the importers was sustained that the tobacco was filler because it did not contain over fifteen per cent. of tocacco suitable for wrapper. In the cases of Sutton Bros., No. 16,735, Dec. 31, 1895, Garcia & Co., No. 16,825, Jan. 15th, 1896, and Salomon & Bro., No. 17,071, March 27th, 1896, and Rothchild Brother, 17,665, Dec. 11, 1896, the same question was passed upon by the Board and the decision was based upon the same principle. These were the last decisions under the act of 1894.

The fact that the governmeat did not appeal from these decisions is exceedingly persuasive in aid of the construction for which we contend.

The next important step in the history of this subject is the passage of Chapter 11, of the Laws of 1897, known as the Dingley Act. The provisions concerning leaf tobacco read as follows :

"213. Wrapper tobacco, and filler tobacco when mixed "or packed with more than fifteen per centum of wrapper "tobacco, and all leaf tobacco the product of two or more "countries or dependencies when mixed or packed to-"gether, if unstemmed, one dollar and eighty-five cents "per pound ; if stemmed, two dollars and fifty cents per "pound; filler tobacco not specially provided for in this act, "if unstemmed, thirty-five cents per pound ; if stemmed, "fifty cents per pound."

"214. The term wrapper tobacco as used in this "act means that quality of leaf tobacco which is suitable "for cigar wrappers, and the term filler tobacco means all "other leaf tobacco. Collectors of customs shall not per-"mit entry to be made, except under regulations to be "prescribed by the Secretary of the Treasury, of any leaf "tobacco, unless the invoices of the same shall specify in

"detail the character of such tobacco, whether wrapper or "filler, its origin and quality. In the examination for "classification of any imported leaf tobacco, at least one "bale, box, or package in every ten, and at least one in "every invoice, shall be examined by the appraiser or "person authorized by law to make such examination, "and at least ten hands shall be examined in each exam-"ined bale, box, or package."

"215. All other tobacco manufactured or unmanufac-"tured, not specially provided for in this act, fifty-five "cents per pound."

We come now to the construction of this statute. I do not deem it necessary to enter into a general discussion of the rules for the construction of statutes; but, I shall have occasion to refer to some which I consider particularly applicable to this case.

Does not the history of this subject under the acts of 1883, 1890 and 1894 establish in regard to tobacco honestly packed, two propositions?

1. That in commerce, among dealers in leaf tobacco, the bale is the unit.

2. That there is in bales of wrapper tobacco a certain amount of filler; and, in filler bales, there may be a small per cent. of wrapper tobacco, which in trade is not recognized.

At the time Congress enacted this statute had it not been established also, by long usage between the government and the importer that the bale was the unit and that *a portion* of wrapper tobacco in a bale of filler should come in on filler duty.

Let us now examine the law of 1897 with a view of

determining what the intention of Congress was when the law was enacted. It is evident that Congress knew the condition of the trade in leaf tobacco and the construction that had been put upon former acts. It recognized the fact, as the Treasury Department had recognized it, that the bale, honestly and regularly packed, was the unit of quantity for assessment; that there might be a portion of wrapper tobacco in a bale of filler that was not taken into account, commercially, by dealers in leaf tobacco.

Congress had no good reason for fixing the fifteen per cent. limit in this act, except the one assigned in the Pons case. It seems fair, therefore, to conclude that the reason given in that case for the fifteen per cent. limit is the same as that which induced Congress to fix the same limit in the act under consideration. Except for this reason why did Congress fix fifteen per cent.? Why was not the limit five or ten or twenty per cent.? Under the act of 1890, the decision had been that the bale was the unit and that unless more than fifteen per cent. of a bale was wrapper tobacco no account was to be taken of it. The Wilson Act, as construed, confirmed this limitation of fifteen per cent. This rule then should continue unless there is a clearly expressed intent, by Congress, in the present act, to abandon it. In this act Congress has not expressly manifested its intent to change the law in that respect, but on the contrary seems to have manifested its intention of removing the doubt in regard to this question, and also as to the unit quantity for assessment. Under section 242 of the act of 1890 leaf tobacco was referred to as being imported "in any bale, box, or package, *or in bulk*." The same is true of section 184 of the act of 1894. The omission of the words "*in bulk*" from the act of 1897, is very significant; for, it practically does

away with the importation of leaf tobacco "in bulk," as it fails to provide any rule for a legal examination of tobacco thus imported. It treats of the "bale, box, or "package" as such, and points out specifically the method for the examination of such packages, but no reference is made to tobacco imported in bulk. Other acts provided for importation of tobacco in bulk, but they did not limit examination of tobacco to that in bale, box or package. This is most significant. Under former acts there was ground for saying that the bale was not the unit, for tobacco imported *in bulk* was referred to. And it might be said that there could be no such thing as a unit where the shipment was "in bulk." In this act no tobacco is mentioned except that in bale, box or package. No examination is provided for or required except in "bale, box or package." The abuse which the Treasury Department had complained of prior to this act of 1897 was not the construction of the law by the Board of General Appraisers, but it was that the method of examination was not effective. Undoubtedly this induced Congress to provide the means of remedying the defects in the administration of the law.

First, by recognizing and fixing a unit of quantity: and

Second, by fixing a method for examining the merchandise.

December 8th, 1897, the Treasury Department recognized that the laws as construed by appellee could not be literally enforced and issued a circular of instruction on the subject (No. 18,663, S. D. T. D.). In this circular the Treasurer said: "Whenever the quantity of wrapper "tobacco found in any bale with filler tobacco shall not "exceed one per cent. of the total quantity of tobacco in "such bale no report of such wrapper tobacco need be "made by the appraisers."

The Government here concedes that there may be a "portion" of every bale of filler tobacco that is suitable for wrapping cigars which is to pay filler duty. It also recognizes the bale as the unit of quantity upon which the per cent. is to be computed. But why should the department fix the amount at precisely one per cent. of wrapper that should not be reported? The Board of General Appraisers had said, repeatedly, that any portion of wrapper tobacco in a bale, less than fifteen per cent., was not taken into account in the commercial world among tobacco dealers, and should not be in assessing duty. To say that precisely one per cent. of wrapper in a bale should not be reported and that $1\frac{2}{17}\frac{3}{7}$ per cent. in a bale should be reported, as in bale No. 68 in this case; and to say this without any clearly expressed statutory requirement fixing the per cent., seems most extraordinary.

A general observation is here pertinent. All through the controversy under the three acts, providing for duty upon leaf tobacco, it appears that the government has concurred in the oft-repeated decisions wherein it was held that, in bales of filler tobacco a certain per cent. of wrapper tobacco, fifteen or less, might legally be imported on filler duty; also that the bale was the unit if honestly and regularly packed. This Congress knew; and, we think, intended to settle the controversy by legislative enactment.

Congress intended in the act of 1897 to recognize the bale, box, or package as the unit of quantity and to divide leaf tobacco thus packed into four classes:

First. Bales in which tobacco suitable for wrapping cigars predominated. These are called wrapper bales.

Second. Bales in which more that fifteen per cent. of the tobacco was suitable for wrapping cigars. These, although not wrapper bales, were to be assessible as such.

Third. Bales in which the tobacco was the product of two or more countries or dependencies, mixed or packed together.

Fourth. Bales of tobacco which were all filler, or which contained fifteen per cent. or less of tobacco which might be used for wrapping cigars.

It seems that the above division was intended by Congress and that this intent is expressed in the above statute. Congress had knowledge of the construction that had been given to the previous acts and the course of the government in administering the law; and, it cannot be presumed that with no reason to induce it and without a clear expression to that effect it intended to change the law in this particular.

If Congress had intended to inaugurate an entirely new method of examination and to adopt a different theory upon which tobacco was to be assessed why did it not so legislate? If the construction which the appellee contends for was that intended by Congress how easy it would have been to put this intent into effect by providing as follows: Leaves of tobacco suitable for wrapping cigars, packed or unpacked, and however imported, at the rate of one dollar and eighty-five cents per pound.

What answer could be made by the importer to the position of the Government if Congress had so legislated? Congress recognized the fact that there was a certain amount of filler tobacco in every bale imported for wrapper and that the importer was compelled to pay wrapper duty upon the filler. That there was another class of bales which might be worked up, known as self-working bales, as they contained a goodly proportion of wrapper, although the preponderance of the tobacco was filler. This amount of wrapper tobacco was known to be, in view of the de-

cisions in the Pons case, an amount above fifteen per cent. Fifteen per cent. of wrapper in a mixed bale does not fix the dividing line between a bale of wrapper and one of filler. It does fix the line when the wrapper, in a mixed bale, is sufficient to be considered commercially. We understand a self-working bale must contain somewhat more wrapper than this. Perhaps it should be eighteen to twenty per cent. Congress knew all this and met the situation by providing that all bales having more than fifteen per cent. of wrapper tobacco should pay wrapper duty. Congress also knew that there was a certain amount of tobacco, apparently suitable for wrapping cigars, that, in reality, was not suitable and that it would be so determined after the cigars were manufactured. It also knew that the examination of tobacco was not and could not be absolutely accurate. To provide for this element of uncertainty and to counterbalance, to some extent, the wrapper duty which the importer would pay upon filler tobacco in a wrapper bale, it intended to permit a certain amount of tobacco that could be used for wrapper to be imported upon filler duty. This was not legislating against the Government, it was adoping, by statute, the well known custom which the Government had established. If it should be contended that this particular provision was made to insure a larger amount of revenue than that required under the Wilson bill, we answer that this argument has no force for the following reason: The change of rate from that fixed by the Wilson bill to that of the Dingley bill was sufficient to accomplish that purpose without the construction contended for here by the appellee. Under the Wilson act wrapper tobacco was to pay a duty of one dollar and fifty cents per pound; whereas under this act it is to pay one dollar and eighty-five cents per pound. An increase of more than twenty-three per cent. This would seem to answer any argument than can be made upon the other side predicated

upon the fact that the Wilson bill was framed by a "tariff for revenue only" Congress and the Dingley bill by a Congress of protectionists.

The appellants claim that whatever the true construction may have been as to the unit rule under all previous acts, under the present act Congress clearly intended to adopt the bale, box or package as the unit.

It may be difficult to hold in mind the idea of a unit as applied to a bale, box or package; whereas, it is easy as applied to some concrete commodity as metal or to a living animal. When thus applied it enforces our position very strongly. Perhaps an idea of this can be better presented by assuming the unit to be a living animal. Suppose the statute were paraphrased and read as follows:

Holstein cows, and Ayrshire cows when having not more than fifteen per cent. of Holstein blood, one dollar and eighty-five cents each; Ayrshire cows not specially provided for in this act thirty-five cents each. Would any one argue that ten per cent. of Holstein blood in an Ayrshire cow should be assessed pro rata at the Holstein rate of duty, and the ninety per cent. of Ayrshire blood in such cow assessed at the lower rate?

When the court comes to the conclusion that the bale is the unit as we believe it will, then the next step is made easy by holding in mind the idea that the unit is as perfect a *single entity* as though it were a living creature. How then can wrapper tobacco (fifteen per cent. or less) in such unit be segregated and assessable as such any more logically than could the fifteen per cent. of Holstein blood in an eighty five per cent. Ayrshire cow.

The last part of section 213 of this act reads as follows: "Filler tobacco not specially provided for in this act, if "unstemmed 35c. per lb.; if stemmed 50c. per lb."

There is no other provision in the statute for assessing filler tobacco except the preceding part of this section where it is provided that filler tobacco contained in a bale with more than fifteen per cent. of wrapper tobacco shall be assessed at $1.85 per pound. We contend that the words "wrapper tobacco" in this section have reference to the commercial term "wrapper tobacco" meaning thereby bales of tobacco known as wrapper, although, in every bale there is a quantity of tobacco not suitable for wrapper. If we are correct in this, then there is no provision of statute laying a duty upon wrapper tobacco in a bale, where it does not exceed fifteen per cent., except that it falls under the last clause of the statute and is to be classified as filler tobacco not specially provided for in the act.

A well established rule of construction of statutes applies here. Words are to be used in their ordinary sense, except when they have reference to a particular trade or business. In such case they are to be construed with reference to that particular trade or business.

Unwin v. Hanson (1891), 2 *Q. B.*, 115.

There is no controverting the fact that the term "wrapper tobacco" and "filler tobacco" are commercial terms and that when used in the trade among dealers they have reference to bales of "wrapper" and bales of "filler" tobacco.

The rule that a statute is to be construed so as to give effect to every part is invoked here. There seems to be no purpose subserved by the fifteen per cent. clause, unless it is to mark the dividing line in mixed bales, between those which shall be considered all wrapper and those that shall be considered all filler. It will not be contended on the other side that a statute imposing duties upon imports is to be strictly construed against the

importer. This court has frequently held that such statutes must be reasonably construed to carry out the intent. Upon this point we agree with our learned friends upon the other side. But we insist that this rule has very little application to the case at bar. The title of the statute under discussion states its object to be to furnish revenue and protect industries.

Whether the construction which we contend for or that contended for by appellee is the true one, the intent of Congress is carried out. Either construction would furnish revenue to the government and provide protection to industries.

The increase of duties on this commodity by more than twenty-three per cent. over that provided for by a democratic Congress is sufficient to show the intent of the legislation.

Appellants insist that where a statute is susceptible of two constructions, either one of which will carry out the intent of the law maker, and one imposes a higher rate of duty than the other, that construction will be adopted which is most favorable to the importer.

Powers v. Barney, 5 Blatchford, 200; Adams v. Bancroft, 3 Sumner, 384; United States v. Wigglesworth, 2 Story, 369; United States v. Ullman, 4 Ben., 547; Hartranft v. Wiegmann, 121 U. S., 609; Merritt v. Welsh, 104 U. S., 694–702.

The clause which imposes wrapper duty on filler tobacco provided it is contained in a bale with more than fifteen per cent. of wrapper, necessarily excludes the idea that fifteen or less per cent. of wrapper tobacco in a bale of filler is to pay wrapper duty.

It cannot be claimed that wrapper duty is imposed upon such tobacco by express words. We, therefore, say

that under the rule *expressio unius est exclusio alterius* such tobacco is excluded from wrapper duty. Broom in his Legal Maxims, page 490, 6 ed., says: "When, for "example, certain specific things are taxed, or subjected to "any charge, it seems probable that it was intended to "exclude every thing else even of a similar nature, and "*à fortiori* all things different in genus and description "from those which are enumerated."

Again the clause of paragraph 213, which reads as follows: "Filler tobacco not specially provided for in this "act, if unstemmed, 35 cents per lb.," must refer to the preceding part of this paragraph. A term almost similar to this was so construed in Smythe v. Fiske, 23 Wal., 374.

In this paragraph there is no provision for assessing filler tobacco in mixed bales whenever the wrapper is fifteen per cent. or less, unless it falls under this last clause, and it seems to be unreasonable that the filler and wrapper in such bale should be segregated and assessed as wrapper and filler when in the commercial world these bales are packed, imported, dealt in and known to the trade in no other way than as filler bales. This Congress knew when it enacted the statute, as it also knew that the government had found it impossible to administer a statute that made no allowance for a small per c. nt. of wrapper coming in on filler duty.

When the act was passed Congress had before it the circular of the Treasury Department which we quote above, No. 14,423, and also the Pons case, [redacted] drafted the bill to meet the conditions presented by them as well as all the other facts connected with the history of the subject.

We do not claim that a construction of the statutes by

the Treasury Department is conclusive upon the court, but we insist that, where the government has gone to trial, repeatedly, upon the question and has been defeated; has failed to appeal, and has acted for years under the statutes as construed, then, in a question of serious doubt, the practical construction should be adopted.

Smythe v. Fiske, 23 Wal., 374–382; McCall v. Lawrence, 3 Blatchford, 360–363; United States v. Johnson, 124 U. S., 236; United States v. Hill, 120 U. S., 169; Brown v. United States, 113 U. S, 568; United States v. Moore, 95 U. S., 760.

In the United States v. Alabama RR. Co., 142 U. S., 616, the court held that when the executive department of the government charged with the execution of a statute gives a construction to it and acts upon such construction for a series of years the court will look with disfavor upon a change whereby the parties who have contracted with the government on the faith of the old construction may be injured.

On principle this case is similar to the one at bar. The importer in this case knowing how the government had construed the tariff laws in regard to leaf tobacco relied upon the construction and imported tobacco with the belief that it would be assessed in accordance with that construction. To put a different construction upon the law now will be to the injury of the importer.

We have not been able to find any authority for the position of the appellee that the court has the right to take into consideration the fact that one of the tariff laws was enacted by a "tariff for revenue only" party, and the other by a "protective" party. The acts of Congress must be construed as a continuous system, and this irrespective of any change in the political complexion of the

legislative bodies. The court can no more take into consideration the political complexion of Congress than it can the private opinion of members of that body.

Hilton v. Merritt, 110 *U. S.*, 97–106.

United States v. Oregon & C. R. Co., 57 *Fed. R.*, 426.

So far as I have been able to find there never was a decision of any court, nor by the Board of General Appraisers, under the act of 1894, except those which determined the bale to be the unit, and that fifteen per cent. or less of wrapper tobacco in a filler bale should come in on filler duty. There never had been any abuses requiring a change of the law under this particular provision. The criticism which was passed upon the Wilson Act was that there were abuses under it from the fact that the term "commercially known as wrapper" was so uncertain that experts could say that a bale of tobacco, although it might contain forty per cent. of wrapper, did not come under the class known commercially as wrapper tobacco. By omitting, therefore from the Dingley Act the terms "commercially known as wrapper" Congress did away with the abuses complained of under the law of 1894.

Appellants have not been able to find a decision of any court, nor of the Board of General Appraisers, under the act of 1883, 1890, nor 1894, except in one instance, holding that the bale was not a unit, or that the wrapper tobacco, if fifteen per cent. or less, in a mixed bale was assessable as such where the tobacco was honestly and uniformly packed and where there was no intention to avoid the higher rate of duty. This one case was decided by District Judge Coxe, in Stachelburg, et al. v. United States, 72 Fed. Rep., 50. There is no reasoning in this case. The learned Judge dismisses the case with the remark that the language is too plain for argument. The

government found, however, that this act could not be enforced in the spirit of this decision as it would have been impracticable and would have defeated the primary purpose of the statute, that of producing revenue to the government.

On the other hand the decisions under all the acts from 1883 down to the case at bar, of all the courts, and the Board of General Appraisers, have been in one direction. That is, that where tobacco is honestly and regularly packed and imported without any intent to defraud the government the bale is the unit, and that a portion of wrapper tobacco in mixed bales with filler is assessable at the rate of filler tobacco.

When the Dingley bill was enacted it had been determined that the law of 1894 did not provide sufficient revenue, and that the law of 1890 could not be literally enforced. It had been found that, if it was literally enforced it would exclude all filler tobacco from the country. Therefore, the Dingley bill could not be framed upon precisely the same line as the McKinley Act. An increase of the revenue was demanded over that provided for by the Wilson Act, and the framers of the Dingley bill sought to meet the situation by remedying the defect in the McKinley Act and increasing the amount of duty as fixed by the Act of 1894. This was effectively accomplished, provided the present act is construed as contended for by the appellants.

If, however, the law is to be construed as contended for by the appellee the situation will be almost precisely the same as it was under the McKinley law. The importers cannot afford to pay wrapper duty on a bale of tobacco in which only sixteen to twenty per cent. of the tobacco is suitable for wrapping cigars. Such a bale cannot be imported unless it is counterbalanced

by a bale containing some wrapper that can come in on filler duty. To illustrate this, let us suppose that a bale of this tobacco is worth at the rate of thirty cents per pound ex duty. We will say, for illustration, that the bale weighs one hundred pounds. This would amount to thirty dollars. Filler duty thirty-five cents per pound thirty-five dollars,—total sixty-five dollars for a hundred pounds of filler tobacco. This is all the tobacco is worth whether there is fifteen or less per cent. of wrapper in the bale. Now, assume that there is in a bale ten per cent. of tobacco suitable for wrapping cigars and that this is assessed at one dollar and eighty-five cents per pound. This adds one dollar and fifty cents for every pound of wrapper tobacco, viz: fifteen dollars, which is to be added to the sixty-five dollars, making eighty dollars for a bale of filler tobacco. The ten per cent. of wrapper tobacco cannot be sold as wrapper tobacco from the fact that the labor in separating it costs as much as the wrapper tobacco is worth over the filler. Therefore, this bale must be sold as filler tobacco and the importer would be the loser. He must, therefore, refuse to import that class of tobacco, and the object of the statute is defeated as the government will receive no revenue from this source.

The percentage clause of the Wilson and Dingley acts, if not precisely the same in words, are the same in substance; or, if there be any difference, the latter act is more favorable to the importer than the former. The Wilson acts reads: "That if any bale, box, package or "bulk of leaf tobacco of uniform quality contains exceed- "ing fifteen per centum thereof of the leaves suitable in "color, fineness of texture, and size for wrappers for "cigars, then the entire contents of said bale, box, pack- "age or bulk shall be subject to the same duty as wrap- "per tobacco."

The Dingley act reads: "Filler tobacco, when mixed "or packed with more than 15 per cent. of wrapper "tobacco . . . . . if unstemmed $1.85 per "pound."

The phraseology has not made the law more favorable to the government than the law of 1894 so far as the fifteen per cent. clause is concerned. If abuses had arisen under the former act and the changing of this phraseology was to cure such abuses it has failed of its object.

We cannot believe that the changing of the phraseology was for that purpose, and we look for some other and we find it in the fact that Congress intended, in view of the previous decisions and the difficulties of the government in forcing the law, to remedy the uncertainty by making the bale the unit and allowing the percentage of wrapper of fifteen per cent. and less in mixed bales to come in on filler duty. The appellee lays stress upon the definition of wrapper tobacco as given in the Dingley act. It is contended that this definition shows that fifteen or less per cent. of tobacco suitable for wrapper in a mixed bale is to be assessed as such. On this point we are of the opinion that the law of 1894 was much more exacting than the present law; for, in that act it was provided: "That if any bale, etc. . . . "contained exceeding fifteen per centum thereof of leaves "suitable in color, fineness of texture and size for wrap-"pers for cigars, the entire contents of such bale . . . "shall be subject to the same duty as wrapper tobacco."

It will be observed that this clause is complete in itself. It is not necessary to refer to the clause of the statute defining wrapper tobacco to determine how such tobacco in a mixed bale is to be assessed. The general definition of wrapper tobacco in the statute has no application to

that tobacco suitable for wrapper in a mixed bale, for there is a specific provision of the statute covering it. If, then, under the Wilson act, the bale was the unit and the wrapper tobacco (fifteen per cent. or less) contained in a mixed bale was not assessable as such, there is much more reason for claiming, under the present law, that such tobacco is not assessable as wrapper.

There is no *specific* provision of this statute providing that wrapper tobacco (fifteen per cent. or less) in a mixed bale is to be assessable as such. The general definition of wrapper tobacco in the statute of 1897 does not vary, materially, from that in the act of 1894. This was found to be the case when the law became operative. When a protest was made under the act of 1894 experts were called to show whether or not the tobacco was such as was "commercially known as wrapper tobacco." Under the present law the same class of evidence is adduced to show whether or not the tobacco is "suitable for wrapping cigars." The question of classification, therefore, depends upon precisely the same class of expert testimony. If there were abuses under the former law and the change in phrascology was a remedial one, it has entirely failed of its purpose.

In construing a statute the rule is that language is presumed to have been used in its ordinary, commercial and popular sense. But where a term has an established usage in commerce and trade and at the passage of the act that usage was definite, uniform and general and not partial, local or personal, it will be construed according to its significance in commerce and trade.

Robertson v. Solomon, 130 U. S., 412-415; Recknagle v. Murphy, 102 U. S., 197; 200 chests of tea Smith claimant, 9 Wheat., 430; 112 casks sugar, 8 Peters, 275;

Arthur v. Lahey, 96 U. S., 112; Greenleaf v. Goodrich, 101 U. S., 278; Arthur v. Cummings, 97 U. S., 236; Tyng v. Grinnell, 92 U. S., 467; Curtis v. Martin, 3 How., 106; Elliott v. Swartwout, 10 Pet., 137; Madock v. Magone, 152 U. S., 368; Sonn v. Magone, 159 U. S. 417.

In this case it seems to be established that the term "wrapper tobacco" has by long, uniform and general usage become well understood in the trade to mean bales of tobacco in which the greater portion is suitable for wrapping cigars.

The appellee may argue that the importer may pack his tobacco so that the mixed bales will contain slightly under fifteen per cent. of tobacco suitable for wrapping cigars and thereby evade the statute by importing wrapper tobacco on filler duty. Suppose this is true. Congress intended he should have this right.

In Merritt v. Welsh, 104 U. S., 694, which was a case involving duty on sugar, Justice Bradley said: "Great "stress is laid on the charge that sugars are manfactured "in dark colors on purpose to evade our duties. Suppose "this is true: has not a manufacturer a right to make his "goods as he pleases? If they are less marketable it is "his loss; if they are not less marketable who has a right "to complain? If the duties are effective there is a plain "remedy. Congress can always adopt such laws and "regulations as it may deem expedient for protecting the "interests of the government." In this case the court held that even if the sugar was colored by the manufacturer with the intent of evading the higher rate of duty, he had the right so to do. Applying the same rule to the case at bar we may say: If the importer packed not exceeding fifteen per cent of wrapper tobacco in a bale

with filler with the intent to evade the higher rate of duty the government could not complain, for congress intended he should have that privilege.

Decisions of the Board of General Appraisers construing tariff laws are entitled to great respect. The board takes a broad view of the whole subject and endeavors to construe the law so as to carry out the intent of the lawmaker, the primary object of which is to produce revenue for support of the government. When called upon to construe such statutes as applied to any commodity, the board is upon the ground, it has a view of the whole subject and the surroundings and it is practical and not simply theoretical in regard to the purpose and scope of the statutes. In this respect it is in a position somewhat similar to a trial court which has seen the witnesses, heard them testify and upon their testimony has determined a question of fact. On an appeal from a decision of this kind the Appellate Court looks with great favor upon the determination by the trial court of a question of fact. This is placed upon the ground that the trial court has seen the witnesses, heard the testimony and was able to judge as to the facts in the case. Although the Board of General Appraisers do not occupy precisely this situation in regard to importations of products of the earth, it has very much the same relation to the transactions that a trial court has in determining a question of fact from oral testimony.

The unbroken line of decisions by the Board to the same effect, under various acts, should have great weight with the court in this case. Not less than eleven times has the Board determined this precise question prior to its decision in this case. It is noteworthy that there has never been but one decision of any court to the contrary, Stachelburg v. States, referred to above.

The Circuit Court of Appeals has also in two cases placed the same construction upon statutes as we contend for here.

When we come to the practical application of the law to existing conditions we find the following result. An importer can afford to pay wrapper duty on bales in which the greater portion is wrapper tobacco, although he cannot afford to pay wrapper duty on bales where the wrapper tobacco in a bale is slightly above fifteen per cent. No such bale would ever be imported, except as a part of a heavy shipment, and then it would be by accident. Every importer will endeavor to import all wrapper tobacco in bales by itself. He will endeavor to have every leaf in every bale suitable for wrapping cigars. Although this has been and is the purpose of importers, yet no such tobacco is imported as it is practically impossible to so classify it. That is, so as to have every leaf in every bale suitable for wrapper. Tobacco as packed from the plantation cannot be classified so as to tell absolutely, which is wrapper and which is filler. In a question of doubt the honest dealer, in packing his tobacco, must, necessarily, place the doubtful hands in with filler. Unless he does this he is obliged to pay wrapper duty on it, although it may be filler. If, with an honest purpose and acting upon good judgment, the doubtful hands are placed in filler bales he expects when the tobacco is examined that it will be done with some judgment. The government in its instructions has directed collectors to examine it with judgment; and, under the McKinley act, where the provision was that if *any* tobacco was found in a bale suitable for wrapper, the whole bale was to be classed as wrapper, the government had given specific instructions that *some* wrapper tobacco was permissible without reporting it for wrapper duty. The government had said in its letter of instructions that unless the law was thus construed all

filler tobacco would be excluded. When the present law was enacted Congress had the whole history of this subject before it and determined that the limitation of wrapper tobacco in a mixed bale should be fifteen per cent.

Referring again to the circular No. 14,423, wherein the Treasury Department gave instructions upon this precise question, and calling the court's attention to the fact that, undoubtedly, Congress had this circular before it when it formulated the tobacco provisions of the Act of 1897, we say that the court should construe this statute in the same spirit and hold that,

The bale is the unit, and

That the tobacco suitable for wrapper, if fifteen per cent. or less in a mixed bale, is assessable as "filler to "bacco not specially provided for in this act."

The decision, therefore, should be that the two questions certified should be answered in the negative.

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